TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 637

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

STANDARD OIL COMPANY (NEW JERSEY),
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Volume I

(Proceedings and Appeal Papers)

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INDEX.

	Page.
Certificate	1
Transcript of proceedings	1
Resolutions authorizing complaint	2
Complaint	3
Answer	7
Testimony (in separate volume).	
Notice of final hearing	11
Excerpts from oral argument	11
Commission's report	14
Findings of fact	14
Conclusions	16
Order to cease and desist	17
Petition for review	19
Opinion of court	22
Dissenting opinion	31
Decree	34
Mandate	34
Certificate	35

ED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

FEDERAL TRADE COMMISSION
v.
NDARD OIL COMPANY (NEW JERSEY). } Docket No. 337.

CERTIFICATE.

J. P. Yoder, Secretary of the Federal Trade Commission, fy that the following is a full, true and correct transcript of ecord in the above entitled proceedings, including the pleadings, mony, exhibit, the Commission's report, findings as to the facts conclusions and orders therein; that this transcript is trans- d to the United States Circuit Court of Appeals for the Third uit pursuant to service upon the Commission of a copy of a tion for Review by Chester O. Swain and James H. Hayes, attor- for above-named respondent, on the 14th day of August, A. D.

testimony whereof, I have hereunto subscribed my name and ed the seal of the Federal Trade Commission to be affixed , at the City of Washington, in the District of Columbia, this day of October, A. D. 1920.

AL.] J. P. YODER, *Secretary.*

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

DOCKET NO. 337.

FEDERAL TRADE COMMISSION

vs.

STANDARD OIL COMPANY (NEW JERSEY), RESPONDENT.

script of the proceedings before the Federal Trade Commis- sion, certified to the United States Circuit Court of Appeals for the Third Circuit, in accordance with the provisions of Section 5 of the Act of Congress approved September 26, 1914,

entitled "An Act to create a Federal Trade Commission, ... define its powers and duties, and for other purposes," and ... Section 11 of the Act of Congress approved October 15, 19... entitled "An Act to supplement existing laws against unlaw... restraints and monopolies, and for other purposes"—as a res... of the petition filed in said Court on August 16, 1920, by ... attorneys for the Standard Oil Company (New Jersey), for ... review of the Order to Cease and Desist entered by the Fed... Trade Commission against said Standard Oil Company (Ne... Jersey) under date of April 27, 1920.

Resolution authorizing original complaint—Dated July 18, 19...

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at ... office in the City of Washington, D. C., on the 18th day of J... A. D. 1919.

Present: John Franklin Fort, chairman, Victor Murdock, Hu... Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY).	Docket No. 337. C... plaint in the matter ... the alleged violation ... Section 5 of an Act ... Congress approved S... tember 26, 1914, and ... the alleged violation ... Section 3 of the Act ... Congress approved O... tober 15, 1914.

Whereas, the Federal Trade Commission has reason to believe th... the Standard Oil Company (New Jersey) has violated and is viol... ing the provisions of Section 5 of the Federal Trade Commiss... Act, and of Section 3 of an Act of Congress approved October ... 1914; therefore be it

Resolved: That the Federal Trade Commission issue and ser... upon the said Standard Oil Company (New Jersey) its complai... stating its charges in that respect in substantially the form ... unto annexed, and be it

Further resolved: That notice be given to the said Standard ... Company (New Jersey), as required by law, that the charges of ... complaint will be heard by the Commission at its office in the C... of Washington, D. C., on the 15th day of September, 1919, at ... o'clock in the forenoon of the said day, or as soon thereafter as ... same may be reached.

Adopted by the Commission.

(Signed) J. P. YODER,
Secretary.

[SEAL.]

Original complaint—Dated July 18, 1919.

ITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, chairman, Victor Murdock, Huston mpson, William B. Colver, commissioners.

EDERAL TRADE COMMISSION *v.* ANDARD OIL COMPANY (NEW JERSEY).	Docket No. 337. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe from a liminary investigation made by it, that the Standard Oil Com- y (New Jersey), hereinafter referred to as the respondent, has using unfair methods of competition in interstate commerce, in lation of the provisions of Section 5 of the Act of Congress, roved September 26, 1914, entitled "An Act to create a Federal de Commission, to define its powers and duties, and for other poses," and it appearing that a proceeding by it in respect roof would be to the interest of the public, issues this complaint, ing its charges in that respect on information and belief as lows:

PARAGRAPH ONE: That the respondent, Standard Oil Company w Jersey), is a corporation organized, existing and doing busi- s under and by virtue of the laws of the State of New Jersey, h principal office and place of business located at the City of w York, State of New York; that for more than four years last t respondent has been engaged in the business of purchasing and ing refined oil and gasoline, and the leasing and loaning of oil ps, storage tanks or containers and their equipments, in various s of the United States and the District of Columbia in compe- on with numerous persons, firms, corporations and copartner- s similarly engaged.

PARAGRAPH TWO: That the respondent, in the conduct of its busi- s as aforesaid, and as hereinafter more particularly described, chases refined oil and gasoline, hereinafter referred to as "prod-

ucts," and also purchases oil pumps, storage tanks or containe hereinafter referred to as "devices," the said devices being used contain said products, the said products and devices then bei handled and stored in the various states of the United States a transported in interstate commerce; that the aforesaid products a sold and the aforesaid devices are leased or loaned by respondent various persons, firms, corporations and copartnerships; that in t conduct of its business of purchasing and selling such products an selling, leasing or loaning such devices, the same are constantl moved from one state to another by respondent and there is con ducted by respondent a constant current of trade in such product and devices between various states of the United States; that ther are numerous competitors of respondent who, in the conduct of thei business in competition with respondent, purchase similar product and purchase and manufacture similar devices, the said devic being used to contain said products, the said products and devic then being handled and stored in the various states of the Unite States and transported in interstate commerce; that the aforesai products are sold and the aforesaid devices sold, leased or loaned b such competitors of respondent to various persons, firms, corpora tions and copartnerships; that in the conduct of their business, a aforesaid, competitors of respondent constantly move such produc and devices from one state to another and there is conducted by sai competitors a constant current of trade in such products and devic between the various states of the United States; that respondent an many of its competitors have conducted their said businesses in a similar manner to that above described throughout the past fou years.

PARAGRAPH THREE: That respondent in the conduct of its busi ness, as aforesaid, with the effect of stifling and suppressing competi tion in the sale of the aforesaid products and in the sale, leasing o loaning of the aforesaid devices and other equipments for storin and handling the same, and with the effect of injuring competitor who sell such products and devices, has within the four years las past sold, leased or loaned and now sells, leases or loans the sai devices and their equipments for prices or considerations which d not represent reasonable returns on the investments in such devic and their equipments; that many such sales, leases or loans of th aforesaid devices are made at prices below the cost of producing an vending the same; that many of such contracts for the lease or loa of such devices and their equipments provide or are entered int with the understanding that the lessee or borrower shall not place i such devices, or use in connection with such devices and their equi ments, any refined oil or gasoline of a competitor; that only a sma proportion of the dealers in gasoline and refined oil under such agree ments and understandings deal also in similar products of respon ent's competitors and that only a small proportion of such dealer require or use more than a single pump outfit in the conduct of thei

said business: that there are numerous competitors in the sale of such products, who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline: that there are numerous other competitors of respondent engaged in the manufacture and sale of said devices and their equipments, who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein: that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Standard Oil Company (New Jersey), hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, Standard Oil Company (New Jersey), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business in the City of New York, State of New York: that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various states of the United States and the District of Columbia, in competition with numerous firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and

transported in interstate commerce. That such products are sold, and such devices sold, leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one state to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various states of the United States; that there are numerous competitors of respondent who in the conduct of their businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased or loaned by such competitors in competition with respondent to various persons, firms, corporations and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one state to another and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various states of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE: That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Standard Oil Company (New Jersey), that the charges of this complaint will be heard by the Federal Trade Commission at its office in the City of Washington, D. C., on the 15th day of September, A. D. 1919, at 10.30 o'clock in the forenoon on that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 18th day of July, A. D. 1919.

By the Commission.

[SEAL.] (Signed) J. P. YODER,
Secretary.

(Signed) CLAUDE R. PORTER,
Chief Counsel for the Commission.

Answer of respondent—Filed August 30, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY).	Docket No. 337.

Answer.

Standard Oil Company, respondent in the above-entitled action, answering the complaint herein, by Chester O. Swain, its attorney,

I.

As to the first alleged cause of action, said respondent denies, upon information and belief, that it is or has been using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Act of Congress, approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Further answering the first alleged cause of action in said complaint,

1. Said respondent admits that it is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with a place of business located at the City of New York, State of New York, that for more than four years last past, it has been engaged in the business of manufacturing and selling refined oil and gasoline in various states of the United States and the District of Columbia, in competition with other persons, firms, corporations and copartnerships; it admits that it has incidentally purchased refined oil and gasoline; but respondent denies, upon information and belief, that it is now or ever has been engaged in the business of leasing or loaning oil pumps, storage tanks or containers and their equipments.

2. Said respondent admits that, in the conduct of its business, it manufactures and purchases refined oil and gasoline, hereinafter referred to as "products," and that it also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," and that it handles and stores said products and devices in various states of the United States, and that it causes to be transported in interstate commerce certain thereof; that it sells such products and leases or loans certain of such devices to various persons, firms, corporations and copartnerships; that certain of such products and devices are moved or caused to be moved from one state to another by respondent, and that respondent conducts a current of trade in the sale of such products and devices between various states of the United States; but said respondent is without knowledge as to each and every allegation set out in Paragraph "Two" of the first alleged cause of action in said complaint not hereinbefore specifically admitted or denied.

3. Said respondent admits that, in the conduct of its business within the four years last past, it has leased certain devices and their equipments for the consideration of One Dollar per year and has loaned certain of said devices and their equipments without charge; but it denies that it has sold any of said devices and their equipments for prices or considerations which do not represent reasonable returns on the investments therein, or at prices below the cost of producing and vending the same; and it further denies, upon information and belief, that it has either sold, leased or loaned any of such devices or other equipments with the effect of stifling and suppressing competition in the sale of products or in the sale, leasing or loaning of such devices and other equipments, or with the effect of injuring competitors.

Said respondent admits that certain of its contracts for the lease or loan of devices and their equipments provide that the lessee or borrower thereof shall not place in such devices any refined oil or gasoline other than the products of respondent, but said respondent is without knowledge as to each and every allegation in Paragraph "Three" of the first alleged cause of action herein not hereinbefore specifically admitted or denied.

II.

Said respondent denies, upon information and belief, that it has been using unfair methods of competition in interstate commerce in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

Further answering the second alleged cause of action in said complaint,

1. Said respondent admits that it is a corporation organized, existing and doing business under and by virtue of the laws of the State

of New Jersey, with a place of business in the City of New York, State of New York, and that for more than four years last past it has been engaged in the business of selling refined oil and gasoline in various states of the United States and the District of Columbia in competition with various persons, firms, corporations and copartnerships; but it denies that it is or has been engaged in the business of leasing oil pumps or storage tanks or their equipment.

2. Said respondent admits that, in the conduct of its business, it purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," and that it handles and stores certain of the same in the various states of the United States and transports or causes to be transported certain thereof in interstate commerce; that certain of such products are sold and certain of such devices are leased or loaned by respondent to various persons, firms, corporations and copartnerships, and that it moves or caused to be moved certain of such products and devices from one state to another, and that respondent conducts a trade in such products and devices between the various states of the United States and that it sells its products and certain of such devices in competition with various persons, firms, corporations and copartnerships; but said respondent is without knowledge as to each and every allegation contained in Paragraph "Two" of the second alleged cause of action not hereinbefore specifically admitted or denied.

3. Said respondent denies, upon information and belief, each and every allegation contained in Paragraph "Three" of the second alleged cause of action.

III.

And for the further answer and defense to the complaint herein and the alleged causes of action herein contained, said respondent alleges:

1. That respondent is and has been for many years a manufacturer and marketer of refined oil and gasoline, and that it sells said products under its own lawful brands and trade names in the District of Columbia and in various states of the United States in competition with other persons, firms, corporations and copartnerships; that it purchases from the manufacturers thereof pumps, storage tanks and containers designed for use in the storage and handling of gasoline and refined oil, hereinafter referred to as "devices" and that in connection with and to promote and increase its sales of gasoline and refined oil, it sells, leases and loans such devices. Its sales of such devices have invariably been outright and without any limitations or conditions whatsoever and on prices which yielded to it a reasonable profit. It has also leased for a rental of One Dollar per year, and loaned without charge to many of its customers, devices for the storage and handling of refined oil and gasoline and, inasmuch as the devices so leased or loaned

bear the name of respondent and/or the brands and trade names of its products in such manner as to announce and represent to the public that the oils or gasoline stored or handled therein were the products of respondent, respondent has in the agreement or contract of lease or loan imposed the condition that the lessee or borrower should not store or handle products other than those of respondent in said devices; but respondent has never, in connection with the sale of its products or of the sale, lease or loan of tanks, imposed or sought to impose the understanding or agreement, directly or indirectly, that the vendee, lessee or borrower should not buy or deal in the products of any other manufacturer or marketer of refined oil or gasoline; and, upon information and belief, said respondent has not been and is not using unfair methods of competition in interstate commerce in violation of the Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," or of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," or otherwise.

Wherefore, said respondent demands judgment dismissing the complaint herein, with costs.

CHESTER O. SWAIN,
Respondent's Attorney.

Office and Post Office Address:
26 Broadway, New York City.

STATE OF NEW YORK,
County of New York, ss.:

M. H. EAMES, being duly sworn, deposes and says: That he is an officer, to wit, Assistant Secretary, of the Standard Oil Company, the respondent in the within action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

M. H. EAMES.

Sworn to before me this 29th day of August, 1919.
[SEAL.] LEWIS G. DURYEA,
Notary Public, Queens County.

Commission expires 1921. New York Certificate No. 107.

Notice of final hearing before the commission.

The United States of America.

Before the Federal Trade Commission, Washington, D. C.

FEDERAL TRADE COMMISSION
v.
THE STANDARD OIL COMPANY OF NEW JERSEY. } Docket No. 337.

Please take notice that the final hearing in the above entitled proceeding will be had before the Commission at its offices in the City of Washington, D. C., on the 18th day of February, 1920, at 2.00 o'clock in the afternoon of that day.

(Sgd.) CLAUDE R. PORTER,
Chief Counsel for Federal Trade Commission.

To CHESTER O. SWAIN, Esq.,
26 Broadway, New York.

Acknowledgment is hereby made of the receipt of the above notice this 6th day of February, 1920.

(Sgd.) CHESTER O. SWAIN,
By J. H. HAYES,
Attorney for Respondent.

Excerpts from oral argument before the Commission (dated February 18, 1920), relative to admission of testimony taken at Columbus and Cleveland, Ohio.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION
v.
ATLANTIC REFINING COMPANY. } Docket No. 131.

Also Dockets Nos. 134, 309, 311, 312, 313, 316, 320, 331, 333, 335, 337, and 373.

Washington, D. C., February 18, 1920.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION, COMPLAINANT,
v.
ATLANTIC REFINING COMPANY, RESPONDENT. } Docket No. 131.

FEDERAL TRADE COMMISSION, COMPLAINANT,
v.
STANDARD OIL COMPANY OF NEW YORK, RESPONDENT. } Docket No. 134.

FEDERAL TRADE COMMISSION, COMPLAINANT, v. MALONEY OIL & MANUFACTURING CO., RESPONDENT.	Docket No. 309.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. STERLING OIL CORPORATION, RESPONDENT.	Docket No. 311.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. PAVANIA OIL COMPANY, RESPONDENT.	Docket No. 312.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. RED "C" OIL MANUFACTURING CO., RESPONDENT.	Docket No. 313.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. KENDALL REFINING COMPANY, RESPONDENT.	Docket No. 316.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. GULF REFINING COMPANY, RESPONDENT.	Docket No. 320.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. HARRIS & COMPANY, ELMER E., RESPONDENT.	Docket No. 331.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. SUOR OIL PRODUCTS CORPORATION, RESPONDENT.	Docket No. 333.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. LOUIS BLAUSTEIN (AMERICAN OIL CO.), RESPONDENT.	Docket No. 335.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. STANDARD OIL CO. OF NEW JERSEY, RESPONDENT.	Docket No. 337.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. THE TEXAS OIL COMPANY, RESPONDENT.	Docket No. 373.

WASHINGTON, D. C.,
Wednesday, February 18, 1920.

The above-entitled cases came on for oral argument before the Commission at 2.30 o'clock p. m.

Present: Commissioners Murdock (chairman) and Thompson.

Appearances: Mr. J. A. Burdeau, appearing on behalf of the Federal Trade Commission; Mr. Peter M. Speer (26 Broadway, New York City), appearing on behalf of the Standard Oil Company of New York; Mr. B. H. Hartogensis (Equitable Building, Baltimore, Md.), appearing on behalf of the American Oil Company; Mr. Yale L. Schekter (Morris Bldg., Philadelphia, Pa.), appearing on behalf of the Atlantic Refining Company; Mr. James L. Nesbitt, appearing on behalf of The Texas Oil Company.

* * * * *

Argument of Mr. Peter M. Speer,

Appearing on behalf of the Standard Oil Company of New York.

MR. SPEER: Gentlemen of the Commission.—I won't be able to make anything but a very brief discussion, and before I begin the discussion I want to renew the motion which I made when the testimony was closed in New York. I made a motion that the testimony taken in the Ohio cases which were heard, the testimony taken at Columbus, the first testimony taken in these cases, at which we were not represented—the Commission was represented—that it be regarded as a part of the testimony in this case. Counsel for the Commission was not willing to agree to it then. Possibly he has no objection to it now.

MR. BURDEAU: I say now that it really rests with the Commission. There might be objections. There are cases included in this group of cases that might not want to have testimony taken in Ohio included with this group consolidated here. I personally have no objection to it. If that had been done I might have prepared my case more fully. If the Commission feels that the respondents here ought to have the additional testimony, I haven't any personal objection to it.

MR. SPEER: That motion was joined in, I think, by the Texas Company, the Atlantic Refining Company and the Standard Oil Company of New Jersey.

MR. BURDEAU: I cannot see where there would be any substantial objection to it, because the questions were all the same, and the testimony was all the same.

THE CHAIRMAN: Would it complicate the matter at all, documentarily, in the event of an appeal?

Mr. BURDEAU. If the stipulation is confined to the respondents who desire that, it would not complicate it at all. It would simply mean transmitting the additional testimony.

THE CHAIRMAN: Well, with that understanding that it is so confined, it is agreed to.

Commission's report, findings of fact and conclusions.

(Dated April 27, 1920.)

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, John Garland Pollard, commissioners.

FEDERAL TRADE COMMISSION
v.
STANDARD OIL COMPANY OF NEW JERSEY. } Docket No. 337.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Standard Oil Company of New Jersey, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Chester O. Swain, its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having offered testimony in support of its answer and defenses, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, now makes its report and findings as to the facts, and conclusions:

Findings of fact.

PARAGRAPH ONE. That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located in the City of New York, State of New York, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and

is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with its aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various states of the United States, in competition with numerous other persons, firms, copartnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum.

PARAGRAPH TWO. That the respondent, in the conduct of its business as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline and also purchases oil pumps, storage tanks and containers hereinafter referred to as "devices." That respondent has been and now is maintaining numerous storage stations in various states to which it ships from its refineries, refined oil and gasoline in bulk. And that the said refined oil and gasoline is thereafter sold and delivered to retail dealers in the said several states. That the respondent, in the course of its said business, leases and delivers said devices to various persons, firms, co-partnerships and corporations, in various states other than those in which the said devices are purchased by the respondent, and that in the course of commerce in buying and selling said devices, said devices are moved to, through and among the various states of the United States, and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among said various states of the United States.

PARAGRAPH THREE. That during all of said period, respondent in the course of commerce among the several states and territories of the United States and in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid, during said period, has made and does now make, contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the respondent, exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by respondent, is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid, to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to respondent on the amount invested in such devices. That the respondent leases such equipments in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce.

PARAGRAPH FOUR. That the respondent sells its said products in various states and territories of the United States in competition

with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various states and territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling in wholesale quantities, gasoline, refined oil and petroleum products.

PARAGRAPH FIVE. That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device only for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business only a single pump outfit.

PARAGRAPH SIX. That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid.

PARAGRAPH SEVEN. That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid.

Conclusions.

That the practice of leasing such devices at a nominal rental and of selling said devices for a nominal consideration, is an unfair method of competition in interstate commerce as against the competitors of respondent engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices and also as against competitors of respondent engaged in the business of refining crude petroleum and selling at wholesale refined oils, gasoline and petroleum products, who do not invest in or make use of such devices for the purpose and on the terms and conditions aforesaid.

That the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth herein, unfair methods of competition in interstate commerce within the meaning of Section 5 of an Act of Con-

gress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and constitute a violation of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

(Signed) VICTOR MURDOCK,
Chairman.

HUSTON THOMPSON,
WILLIAM B. COLVER,
NELSON B. GASKILL,
Commissioners.

Dated this 27th day of April, 1920.

Commission's order to cease and desist.

(Dated April 27, 1920.)

UNITED STATES OF AMERICA,
Before the Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, John Garland Pollard, commissioners.

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY OF NEW JERSEY.	Docket No. 337.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Standard Oil Company of New Jersey has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Chester O. Swain, its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission hav-

ing offered testimony in support of the charges of said complaint, and the respondent having offered testimony in support of its answer and defenses, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, and having made and filed its report, findings and conclusions, which said report, findings and conclusions are hereby referred to and made a part hereof.

Now, therefore, it is ordered, that the respondent, Standard Oil Company of New Jersey, forever cease and desist from:

(1) Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Provided however, that as to such pumps and tanks and equipments as are now leased by respondent, contrary to the provisions of this order, respondent shall be required, four months from the date of service hereof, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of this order.

It is also ordered under and by virtue of the authority conferred on the Commission by Paragraph B of Section 6 of "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914, that the said Standard Oil Company of New Jersey, respondent, shall, within thirty days after the expiration of the time allowed for the respondent to comply with this order to cease and desist, report in writing to the Federal Trade Commission, fully stating and setting forth the nature of the changes made in the conduct of its business with respect to such matter involved in the order to cease and desist, and shall set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil tanks and pumps for use in storing refined oil or gasoline; what plan or plans are in

use or are proposed to be put in use, and also attached to such report, any contract used by the respondent in the conduct of such business.

Dated at Washington, this 27th day of April, A. D. 1920.

By the Commission,

[SEAL.] J. P. Yoder, *Secretary.*

In the United States Circuit Court of Appeals For the Third Circuit.

Standard Oil Company, a corporation, etc., of New Jersey, petitioner, v. Federal Trade Commission, respondent.	On Petition for Review, etc.

Petition for review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Greeting:

The petition of the Standard Oil Company respectfully shows:

1. That it is a corporation, organized and incorporated under the laws of the State of New Jersey, with its office and principal place of business at Bayonne, New Jersey, within the Third Circuit of the United States Circuit Court of Appeals.

2. That heretofore and on or about the 18th day of July, A. D. 1919, the respondent herein issued its complaint against your petitioner, alleging certain violations of Section 5 of the Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914, and of Section 3 of the Act of Congress entitled "An Act to Supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914.

3. That thereafter the petitioner filed its answer to said complaint and after hearings had, on or about the 27th day of April, A. D. 1920, the said respondent made its report, findings and conclusions, and issued its order directing this petitioner forever to cease and desist from:

(1) "Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract

or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent; and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made."

4. That said order also provided: "that as to such pumps and tanks and equipments as are now leased by petitioner, contrary to the provisions of said order, petitioner be required, four months from the date of the service of said order, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of the provisions of said order"; and also that within thirty days after the expiration of the time allowed for petitioner to comply with the said order to cease and desist, petitioner report in writing to the Federal Trade Commission fully stating and setting forth the nature of the changes made in the conduct of petitioner's business with respect to such matter involved in the order to cease and desist, and that petitioner should set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil pumps and tanks for use in storing refined oil or gasoline; what plan or plans are in use or are proposed to be put in use; and also to attach to such report any contracts used by petitioner in the conduct of such business.

5. That your petitioner conceiving itself aggrieved by the making of said report, findings and conclusions and the issuance of said order, desires to obtain a review of the same.

Wherefore your petitioner humbly prays this court review such order entered as aforesaid and set aside the same.

And your petitioner will ever pray.

STANDARD OIL COMPANY.
By W. C. TEAGLE,
Its President.

CHESTER O. SWAIN,
JAMES H. HAYES,
Attorneys for Petitioner.

STATE OF NEW YORK,
County of New York, ss.:

W. C. TEAGLE, of full age, being duly sworn, deposes and says that he is the President of the above-named petitioner, STANDARD OIL COMPANY, and is duly authorized to make this affidavit on behalf of said petitioner, and that the said petition is true of his own knowledge, except as to the matters therein stated on information and belief and as to these matters he believes it to be true.

W. C. TEAGLE.

Sworn to before me this 6th day of Aug., 1920.

M. H. EAMES,
[SEAL.] *Notary Public Kings County.*

Certificate filed in New York County. Certificate No. 67.

STATE OF NEW YORK,
County of New York, ss.: No. 35690 Series B.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county.

Do Hereby Certify, That said Court is a Court of Record, having by law a seal; that M. H. Eames, whose name is subscribed to the annexed certificate or proof of acknowledgement of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 7 day of Aug. 1920.

WM. F. SCHNEIDER,
Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2599. October term, 1920.

STANDARD OIL COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

And afterwards, to wit, on the 4th day of October, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Victor B. Woolley, and Hon. J. Warren Davis, Circuit Judges, and Hon. Hugh M. Morris, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 14th day of July, 1922, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision.

In the United States Circuit Court of Appeals for the Third Circuit.

STANDARD OIL COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2599. October Term 1920.
GULF REFINING COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2609. October Term 1920.
MALONEY OIL & MANUFACTURING COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2632. March Term 1921.

Separate petitions to set aside several orders of the Federal Trade Commission.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. In these proceedings we are asked to review and set aside three orders of the Federal Trade Commission commanding the petitioning corporations forever to cease and desist from a practice found by the Commission to violate Section 5 of the Act creating the Federal Trade Commission (38 Stat. 717) and Section 3 of the Clayton Act. (38 Stat. 730.) The applicable provisions of these statutes are, in the first, "That unfair methods of competition in commerce are * * * unlawful", and, in the second, "That it shall be unlawful for any person engaged in commerce to lease * * * or make a sale * * * of goods, * * * machinery, * * * or other commodities * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, * * * machinery, * * * or other commodities of * * * competitors of the lessor or seller, where the effect of such lease or sale, * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

These are three of a large number of cases involving the same practice. They were tried in three groups. The testimony in one group bore most directly on gasoline marketing in states along the Atlantic seaboard. In another it related particularly to business done by companies within the State of Ohio. In the third it concerned business farther west. As the testimony in all cases was in the main identical, the twelve comprising the eastern group (which includes the cases at bar) were combined and heard together.

The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement and delivery of gasoline to the consuming public. The practice extends mainly to the retailer whose place of business is referred to as a "curb filling station." The leased equipment is known as a "curb pump outfit" and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles. The retailer is the proprietor of the station and is generally engaged in some other business. Typical of his class are keepers of country stores, residents in hamlets and at cross-roads, and farmers. The practice does not relate to retail stations owned and managed by the refining and marketing companies themselves. These are the more elaborate affairs also familiar to the public and generally known as "service stations." Proprietors of garages comprise an intermediate class of retailers to whom the practice in some measure extends.

The practice held by the Commission to offend against the statutes is found wholly within the terms of the leasing contracts. The form of the contract is important in two respects: First, in what the wholesaler requires the retailer to do; and second, in what it does not require him to do. The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the "equipment shall be used solely for the storage and handling of motor gasoline purchased by the" retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination: First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer; and fourth, by either party upon five days' notice in writing to the other party; with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important.

The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline.

In justification of their practice the petitioners maintain that the curb pump outfit is a natural development of the oil industry. In this industry the distribution and marketing of petroleum products more or less volatile and therefore more or less dangerous has always been a serious problem. The petitioners point out that for many years kerosene and other less volatile oils have been sold to retailers in barrels or direct to householders in cans. The barrels and cans being the property of the wholesaler are returned when the contents are removed. When the market for gasoline and more volatile oils developed, the wholesaler for safety shipped them to the retailer in steel barrels or drums. These also remained the property of the wholesaler and were returned when empty. With the marvelous increase of motor vehicles in all sections, urban and rural, there came a corresponding necessity for wider distribution of gasoline. Distribution from large central reservoirs to distant places by barrels and drums was no longer practicable. Then curb filling stations were established and curb pump outfits were installed whereby gasoline is delivered by tank trucks to many smaller centers and there stored and sold. These centers grew in number as the demand spread. At first this demand was met by one station and one outfit. As the demand increased stations and outfits were multiplied, the purpose of the practice, the petitioners claim, being to increase business by making easy and convenient the sale of gasoline to the public everywhere. But outfits cost money and the little storekeeper and the farmer by the roadside could not be induced, and frequently were not able, to invest capital in the purchase of an outfit. The result was that outfits were purchased by the wholesaler and loaned or leased to the retailer at practically no cost to him, yet upon the terms with respect to their use which we have detailed.

The view which the Federal Trade Commission takes of this practice is quite different. Its conclusions based on its findings of fact are that the installation of one outfit either supplies the needs of the retailer or meets the demand of his locality, and that, in consequence, the retailer has neither economic means nor personal desire to permit the installation of more than one outfit on his premises; that the contract for an outfit has the effect of tying the retailer to the products of the one wholesaler so long as one outfit meets the local demand and of substantially lessening competition by enabling

the wholesaler to monopolize first one retailer and then, as the contracts are multiplied, to monopolize many thousand retailers, and eventually the whole territory in which they reside. Finding this practice of the petitioners violative of the laws referred to, the Commission entered the orders to cease and desist here under review.

On this statement of facts we shall discuss the practice as it bears on four classes of interested parties. The first of these is the public.

The Federal Trade Commission Act, in so far as proceedings thereunder are founded on a public interest, provides:

"* * * if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. * * *." (38 Stat. 719, Sec. 5. F. T. C. *vs.* Gratz, 253 U. S. 421.)

The petitioners challenge the authority of the Federal Trade Commission to institute and prosecute these proceedings on two grounds as affecting the public interest. The first is, that the complaints do not allege facts necessary to show that public interest is involved. Upon taking this position there arose an issue whether public interest is a matter to be found by the Federal Trade Commission preliminary to the issuance of its complaints, or is a fact to be alleged in the complaints and proved like any other fact. This question, in view of the record, is purely academic, because whether public interest is to be regarded as a consideration moving the Commission to action or a jurisdictional fact to be pleaded and proved in support of its action, the fact of public interest in these cases is abundantly established.

The law of unfair competition in its modern conception regards as its chief concern the effect of forbidden acts upon consumers. The Congress in passing the Clayton Act and denouncing tying contracts and leases obviously had in mind the public as the principal sufferer therefrom. It is true, as said by Judge Denison in Steers *vs.* United States, 192 Fed. 1, in speaking of the Sherman Anti-Trust Act, 26 Stat. 209, that the theory of injury to the public lies at the bottom of the statutes and is directed against things which tend to deprive the public of the advantages which flow from free competition. Having denounced methods of business which are unfair and which substantially lessen competition and tend to create a monopoly, it is clear that in a case of this kind the public is within the protection of these statutes. If under these statutes the practice is illegal, then in truth the public which pays the bill is the main sufferer. As the practice extends to many thousand retailers and comprehends many million transactions through territory comprising more than half of the population of the United States, it is idle to say that the public has not an interest. Therefore, on this contention we think the petitioners have wholly failed to grasp the principle and purpose of the statutes and are entirely wrong in their contention.

The next contention of the petitioners, however, is very different. It squarely meets the issue of public interest and is to the effect that the evidence fails to show that the public has been injured. With

this we agree. Postponing discussion of the effect of the practice upon competition and monopoly, we do not find that the practice has increased the cost of distribution or has enhanced the price of gasoline to the public. On the contrary it has decreased the cost of distribution. Whether the price to the public has been reduced, we cannot say. Clearly the public has found an advantage in the practice both in the matter of convenience and in the certainty of getting the precise make of gasoline advertized on the globe of the pump. On the other hand, if the orders of the Commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals stand, the inevitable result will be that the number of curb filling stations will be reduced, thereby lessening the convenience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment the public doubtless will undergo its usual experience of paying higher prices.

The second class of parties interested in or affected by the practice is that of oil refiners or wholesalers, including both the petitioning wholesalers—the leading actors in the practice—and their wholesale competitors. The parts played by the members of this class depend for their legality upon the scope and purpose of the two statutes involved.

The first paragraph of each of the orders of the Commission does not deal with the restrictive clause of the contract: it deals solely with the leasing of outfits for a nominal rental or for no rental at all. One question decided by the Commission and here under review is whether this feature of the contract is an unfair method of competition within Section 5 of the Federal Trade Commission Act. Interpreting this section, the Supreme Court, in Federal Trade Commission *vs.* Gratz, 253 U. S. 421, 427, said:

"The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Therefore in determining, as matter of law, whether leasing of gasoline outfits without rentals is an unfair method of competition, we shall inquire whether the method is characterized by oppression of competitors or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. So also under the Clayton Act, by force of which the Commission framed the second paragraph of each of its orders denouncing the restrictive

clause of the contract, we shall, upon the authorities given below, make a similar inquiry with reference to the effect of the practice in lessening competition and creating a monopoly. To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly. The Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —. Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize," and by the courts in construing the Sherman Act with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein." Great Atlantic & Pacific Tea Co. *vs.* Cream of Wheat Co., 224 Fed. 566, 573; affirmed 227 Fed. 46; United States *vs.* American Tobacco Co., 221 U. S. 106, 179; United States *vs.* Patten, 226 U. S. 525, 541; Eastern States Lumber Asso. *vs.* United States, 234 U. S. 600, 613, 614; Standard Oil Case, 221 U. S. 1; Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —.

Applying this standard to the trade practice here involved, the first question, that of unfair method of competition, relates to the leasing of outfits without rentals.

Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in

the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly and, accordingly, was not, in our opinion, an unfair method of competition.

But the Clayton Act, when it came along, bore upon another phase of the contract, namely: upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. In the United Shoe Machinery Corporation case, — U. S. —, the Supreme Court said:

"While the clauses enjoined do not contain specific agreements not to use the machinery of the competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly, is, we believe, equally apparent * * * This system of tying restrictions is quite as effective as express covenants could be and practically compels the use of the machine of the lessor except upon risks which the manufacturers will not willingly incur."

The point of similarity between the United Shoe Machinery Corporation case and the cases at bar is that, in both, the offending clauses did not expressly provide against the use of machinery or equipment of competitors. The difference between the contract clauses in the two cases is that as certain machinery of the United Shoe Machinery Corporation was essential to the lessee in his business, the practical effect of the clauses in that contract, although not specifically prohibiting the use of the machinery of a competitor, was absolutely to prevent its use; while the clause of the contract in the cases under consideration related to but one kind of machine or equipment, and extended to a situation which did not impose upon the lessee the necessity of obtaining something from the lessor which was indispensable in his business, the clause, in consequence, did not have the practical effect of preventing the use of equipment of a competitor.

Also, the cases at bar are distinguished from the Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —, by the fact that the contract in that case contained an express agreement that the retailer should not sell or permit to be sold on his premises any other make of patterns. Here was a restrictive covenant which by its terms came within the third section of the Clayton Act. In discussing this clause the Supreme Court approved an observation in the opinion of the Circuit Court of Appeals, as follows:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single patternmaker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations: so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It has been suggested that this expression is apposite to the leasing contract here under discussion. But we think the cases are distinguished by the important fact that there the dealer was restricted by the contract to the sale of patterns of one manufacturer. This eliminated from his business all other patterns and tied him to the patterns of the contract. Here he is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own; and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed. "That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —; Standard Oil Co. *vs.* F. T. C., 273 Fed. 478; Canfield Oil Co. *vs.* F. T. C., 274 Fed. 571; Sinclair Refining Co. *vs.* F. T. C., 276 Fed. 686.

The third class of parties interested in the practice is that of retailers.

Many retailers buy and own curb pump outfits. With these we have nothing to do except to note that by the practice of leasing outfits competition with them is greatly increased. We are concerned only with the retailer who has not money enough to purchase an outfit, or, having money, does not care to risk it. What happens?

If his locality promises trade, one of the many wholesalers will supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely: that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to change outfits at will, replacing one by another as often in the course of wholesalers' competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and, correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized.

The fourth class of parties claiming an interest in the practice is that of manufacturers of curb pump outfits. Of these there are a half dozen or more in the country, in none of which the petitioning corporations have an interest. The petitioning corporations do not manufacture pump outfits themselves but purchase them from manufacturers like anyone else. The Commission found as a fact that having purchased outfits, the petitioning corporations then lease them in competition with manufacturers engaged in the sale of like equipment in commerce, and upon this finding drew the conclusion,

"That the practice of leasing such devices at a nominal rental * * * is an unfair method of competition in interstate commerce as against the competitors of respondents engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices * * *."

After the manufacturer has sold equipments to the respondents without condition or limitation, and has turned them loose in commerce, we are at a loss to see just how he can be heard to complain that the equipment so sold and paid for is being leased by the owners on terms which make it difficult for him to sell like equipments to others. As there is involved here no question of fraud, deception, good conscience, or even business ethics, we should hesitate to follow business transactions to this length and determine whether conduct so remotely related to the original transaction of purchase is an unfair method of competition.

Having given these cases full and deliberate consideration, we are of opinion that, while the evidence supports some of the Commission's findings of fact as distinguished from the conclusions drawn from them,—it does not establish the offences laid in the complaints and founded on the statutes, and, accordingly, does not sustain the orders based thereon. Therefore, we are constrained to set aside the orders and direct that the complaints be dismissed.

MORRIS, District Judge, concurring in part and dissenting in part.

The operative parts of the order of the Commission here attacked are that the respondent forever cease and desist from:

"1. * * * leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation * * *.

"2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent. * * *."

The first paragraph of the order is directed only to the method of competition whereby the petitioners lease pumps and tanks to retailers at a nominal rental and is concerned not at all with the restrictive or tying clause of the lease. Divorced from the tying clause, leasing the pumps at a nominal rental is, in my opinion, a practice "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression," nor is that practice against public policy as declared by the Sherman and Clayton Acts and, consequently, is not an unfair method of competition within Sec. 5 of the Trade Commission Act as interpreted by the Supreme Court in Federal Trade Commission v. Gratz, 253 U. S. 421, 427, even though the leasing of the pumps at a nominal rental may, perhaps, have a tendency to lessen competition either in the sale of pumps or in the sale of gasoline at wholesale. I am, therefore, in full accord with the views expressed by the majority of the Court with respect to the first paragraph of the Commission's order.

The second paragraph of the order rests upon Sec. 3 of the Clayton Act. While Sec. 5 of the Trade Commission Act provides "if it shall appear to the Commission that a proceeding by it * * * would be to the interest of the public, it shall issue," &c., no similar provision is found in the Clayton Act. In proceedings under that act public interest is as conclusively presumed as in a criminal proceeding and needs to be neither alleged nor proved. Consequently, as I see it, the petition for review presents with respect to the second

paragraph of the order two questions only. First, whether the lea
here involved are "on the condition, agreement or understandi
that the lessee * * * shall not use or deal in the goods, * *
merchandise * * * or other commodities of a competitor of t
lessor" and, if so, then, second, whether "the effect of such lea
* * * condition, agreement or understanding may be to substa
tially lessen competition or tend to create monopoly in any line
commerce," both within the meaning of Sec. 3 of the Clayton A
The leases contain the following provision:

"That the said equipment shall be used solely for the storage a
handling of motor gasoline purchased by the party of the seco
part from the party of the first part for the purpose aforesaid
While the foregoing clause does not contain a specific agreement n
to use or deal in the gasoline of a competitor of the lessor, yet t
clause falls within the terms of the Clayton Act if its practical effe
is to prevent such use. United Shoe Machinery Corp'n, et al. v. T
United States (Decided April 17, 1922). Whether the practical effe
of the restrictive agreement is to prevent the lessee from using
dealing in the gasoline of a competitor must be determined from t
findings of the Commission and the evidence adduced before it, f
under section 11 of the Clayton Act its findings of fact are conclusiv
if supported by the testimony. One of the findings of the Comm
sion, supported by the testimony, is "that a small number of reta
dealers to whom the respondent leases or sells such devices upon t
terms and conditions aforesaid, handle similar products of respon
ent's competitors, but a large majority of the retailers to whom t
respondent leases or sells such devices upon the terms and conditio
aforesaid, require and use in their business only a single pump or
fit." With respect to the one pump retailer the restrictive clause
the leases in question is as effective in preventing the lessee from usi
or dealing in the gasoline of a competitor of the lessor as if the lea
expressly so provided. True, the lessee may terminate the lease at t
time and under the conditions mentioned therein but that fact do
not enable the tying clause to elude the prohibition of section 3
the Clayton Act for that section operates with respect to short ter
leases and leases at will in like manner and with like force as it do
with respect to long term leases or, for that matter, leases in pe
petuity. The legality or illegality of the tying clause is dependen
not at all upon the duration of the lease or the manner in which
may be terminated. It is likewise true that the lessee has the rig
to install another pump of his own or a pump of a competitor, b
as his business does not warrant or require more than one pump
has not installed more than one and, consequently, his right is not
practical one but a mere abstract right. The result in my opinion
that in practice the restrictive clause of the leases in question h
prevented and prevents a "single pump" lessee from using or dea
ing in gasoline of a competitor of the lessor just as effectively
if the lease had expressly so provided. Consequently, the lea
falls within the prohibition of Sec. 3 of the Clayton Act if t

effect of such lease "may be to substantially lessen competition or tend to create a monopoly" in selling gasoline at wholesale. Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been and now is restricted not with respect to an insignificant number of retailers but with respect to a large majority thereof and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of the competitors of the respective lessors.

The petitioners have set up as a reason for the reversal of the Commission's order the excellence of the pump as a means for storing and delivering gasoline. But the Commission has not attacked the pump. On the contrary it admits the pump's many advantages and great utility. It denies, however, the right of the petitioners to make unlawful contracts with respect thereto or otherwise to use it as a means of stifling competition. The petitioners further urge that the restrictive clause is the only method by which they are enabled to use and adequately protect their trademark. Even if this contention were supported by the evidence it would be ineffective, for the petitioners are not at liberty to violate the law of the land whatever proper result may be the consequence of their so doing. The evidence, however, discloses that many pumps are owned by retailers, yet there is no evidence that the name of the gasoline being sold through such pumps is not exhibited in the same manner as it is on the leased pumps. Nor is there any evidence that in such cases the gasoline of one wholesaler has been sold as the gasoline of another. These last contentions of the petitioners are, in my judgment, wholly irrelevant to either of the two issues presented with respect to Sec. 3 of the Clayton Act. Again, the petitioners contend that by means of the leases in question the number of retailers has been substantially enlarged and competition thereby increased rather than lessened. If it be a fact that by means of the leases the number of retailers has been increased such increase was beyond question due to the nominal rental and not to the tying clause and the tying clause is none the less invalid even though accompanied by other clauses that are valid. Furthermore, each increase obtained by the nominal rental was simultaneously monopolized by the tying clause and competition thereby lessened and not increased.

Although not differing from the majority of the Court as to the legal principles by which the correctness of the second paragraph

of the Commission's order should be tested, yet I find myself not in full accord with their ultimate decision for the only conclusion that I am able to reach by applying those principles of law to the facts of these cases is that the effect of the restrictive covenant has been, now is and so "may be" to substantially lessen competition; that the practical effect of that covenant is to prevent the "one pump" retailer from using or dealing in the gasoline of a competitor of his lessor and that, consequently, all "one pump" leases are in violation of Sec. 3 of the Clayton Act and invalid.

(Endorsements:) 2599. Opinion of the Court by Woolley, J., and dissenting opinion by Morris, J. Received & filed Jul. 14, 1922. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2599. October Term, 1920.

STANDARD OIL COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

Appeal from the Federal Trade Commission of the United States.

This cause came on to be heard on the transcript of record from the Federal Trade Commission of the United States and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

VICTOR B. WOOLLEY,
Circuit Judge.

PHILADELPHIA, July 14th, 1922.

(Endorsed:) No. 2599. Order setting aside order of Federal Trade Commission, etc. Received & Filed, July 14th, 1922. Saunders Lewis, Jr., clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the ——— of the United States, Greeting:

Whereas, lately before the Federal Trade Commission of the United States ———, before you or some of you, in a cause between The Standard Oil Company, of New Jersey, (defendant below) Petitioner, and the Federal Trade Commission, (plaintiff below) Respondent, and order was entered by the Said Federal Trade Commission against the Standard Oil Company, of New Jersey, on the twenty-seventh day of April, 1920, which order is of record in the office of the said Federal Trade Commission, to which reference is

hereby made, and the same is hereby expressly made a part hereof: as by the inspection of the transcript of the record of the said Federal Trade Commission which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a petition to review agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

PHILADELPHIA, *July 14th, 1922.*

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Witness, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, at Philadelphia, the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Original File No. 2559. U. S. Circuit Court of Appeals, Third Circuit. No. 3, October Term, 1921. Standard Oil Co., of New Jersey, petitioner, *vs.* Federal Trade Commission, respondent. Copy of mandate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit. Set.

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original of Vol. I of record and proceedings in this Court in the case of: Standard Oil Company, Petitioner, *vs.* Federal Trade Commission, Respondent, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 11th day of September in the year of our Lord one thousand nine hundred and Twenty-two and of the Independence of the United States the one hundred and Forty-seventh.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.